IN THE

Supreme Court of The United States

WASHINGTON, D. C.

NO. 11

OCTOBER TERM, 1964

DEWEY McLAUGHLIN, et al.,

Appellants,

-vs-

STATE OF FLORIDA

Appellee.

BRIEF OF APPELLEE

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On Appeal from the
Supreme Court of the State of Florida

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OPINION BELOW

The statement contained in appellants' brief with reference to the opinion below is satisfactory.

JURISDICTION

The statement contained in appellants' brief with reference to jurisdiction is satisfactory.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Provisions (1) - (6) as set out in appellants' brief are satisfactory; however, the state finds it necessary to add the following as applicable:

(7) This case involves an addition to the six provisions set out in appellants' brief:

Section 798.02,. Florida Statutes:

> **Lewd and lascivious behavior.** If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and lascivious behavior, they shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding three hundred dollars.

(8) In addition to Section 798.02, Florida Statutes, and the six provisions set out in appellants' brief, this case also involves Section 798.03, Florida Statutes, which provides the following:

> **Fornication.**—If any man commits fornication with a woman, each of them shall be punished by imprisonment not exceeding three months, or by fine not exceeding thirty dollars.

QUESTIONS PRESENTED

I

WHETHER THE FOURTEENTH AMENDMENT AFFECTS STATE ANTI-MISCEGENATION LAWS OR STATUTES.

II

WHETHER THE QUESTION OF THE CONSTITUTIONAL VALIDITY OF STATE ANTI-MISCEGENATION LAWS IS PRESENT IN THE INSTANT CASE.

III

WHETHER THE DEFENDANTS, BY BEING PROSECUTED UNDER A STATUTE WHICH PROHIBITS INTERRACIAL COHABITATION, WERE DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, AS SUCH TERMS ARE ENCOMPASSED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IV

WHETHER THE WORD NEGRO AS USED IN SECTION 798.05, FLORIDA STATUTES, RENDERS SUCH SECTION SO AMBIGUOUS AS TO LEAVE APPELLANTS UNNOTIFIED THAT THEIR ACTION WAS PROHIBITED.

V

WHETHER THE PROVISIONS OF THE ALLEGED FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION WERE VALIDATED AS REQUIRED BY ARTICLE V OF THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

The following represents a temporal arrangement of the circumstances applicable to the present case; each of such circumstances is supported by a reference to that portion of the record (designated by the letter "R") which verifies its existence.

On the 12th of January, 1961, in the city of Miami Beach, appellant Dewey McLaughlin applied for a civilian registration employment card (R 73). In response to the specific question of whether he was married, single, separated, divorced, or widowed, he answered that he was separated from his wife, Willie McLaughlin (R 74, 75, 78).

In April of 1961, appellant Connie Hoffman commenced to reside at an apartment owned by one Mrs. Dora Goodick (R 21, 22). During the initial portion of such residence, appellant Hoffman lived with a white man named Hoffman, whom she introduced as her husband (R 22, 28). She registered as Connie Hoffman (see State's Exhibit I in the record).

In December of 1961, the appellant McLaughlin commenced living with the appellant Hoffman (R 23, 29, 30, 31). In February, 1962, Mrs. Goodick reported to the police the circumstances concerning the cohabitation of appellants. (R 23).

On February 23, 1962, Officers Stanley Marcus and Nicolas Valeriana made an investigation of the premises wherein appellants were living, pursuant to information they were cohabiting illegally and that Connie Hoffman's minor child was not receiving proper care (R 33, 36, 39, 46, 50).

Appellants admitted to the officers that they had been living together and having sexual relationships for several weeks (R 53, 54). Such investigation terminated without prosecution for the illegal cohabitation (R 54). Five days later, however, upon further information that appellants were continuing to live together, both were arrested (R 55).

On March 1, 1962, information was filed charging the appellants with having habitually lived in and occupied in the nighttime the same room in violation of Section 798.05, Florida Statutes (R 3). On March 5, 1962, appellant Hoffman was interviewed by the state Department of Public Welfare (R83). Such interview revealed that appellant Hoffman lived in a common-law relationship with one Robert Gonzalez in the year 1956 (R 83); that she had never married Gonzalez because she had never had a legal divorce; that she lived with Mr. Hoffman, but had never legally

married him (R 83); that in October, 1961, she had commenced living with Mr. McLaughlin as her common-law husband, but was not married to him (R 84), and then stated that there had been no marriages and no divorces (R 84). Appellant Hoffman told the welfare agent, while discussing the present case, that she herself was white, and that McLaughlin was Negro (R 84).

On April 11, 1962, a motion to quash the information was filed in behalf of both appellants (R 5). Such was denied on April 12, 1962 (R 6). Jury trial commenced on June 27, 1962 (R 18). On June 28, 1962, such trial terminated with a verdict of guilty (R 7). On the same date, defendants each were adjudged guilty and sentenced to one month in the county jail and a fine of $150.00 (R 8). Motion for new trial was denied on July 3, 1962 (R 11).

Appropriate appeal was taken to the Florida Supreme Court (R 1). Such appeal initially raised all errors presently submitted to this court (R 12); however, in briefing the questions and in petitioning for rehearing, the appellants abandoned their position that the statute under which they were prosecuted was vague and indefinite (R 103). (See also appendix "A" to appellee's brief wherein there is contained a photostatic copy of the only brief presented to the Florida Supreme Court by the appellants). The Florida Supreme Court rendered an opinion affirming the conviction (R 99). Appellants then took appropriate appeal to this court, and after a finding of probable jurisdiction, the case arrived at its present status.

ARGUMENT SUMMARY

Appellants have presented three issues to the court, to wit:

(1) That they were denied their rights under the Fourteenth Amendment by the court's instructing the jury that a defense of common-law marriage would not be available to the appellants if such marriage was undertaken in the state of Florida;

(2) That Section 798.05, Florida Statutes, violates the provisions of the Fourteenth Amendment by placing interracial cohabitation in an unfavored classification when compared to intraracial cohabitation;

(3) That Section 798.05, Florida Statutes, which prohibits habitual cohabitation between a negro and white male-female is unconstitutional under the federal constitution because of vagueness caused by the use of the term "Negro".

With regard to issue (1), the state's position is that in interpreting the meaning of the terminology used in the Fourteenth Amendment, the national congress concluded that such amendment would not affect anti-miscegenation laws or give unto the negro the right to vote. The continuation of the state anti-miscegenation laws after the adoption of the Fourteenth Amendment clearly indicates that the majority of the state legislatures, at the time they ratified the Fourteenth Amendment, had no intent nor understanding that it would affect anti-miscegenation laws. The

courts' opinions contemporary with the adoption of the Fourteenth Amendment unanimously sustained anti-miscegenation laws which were tested, thereby indicating that the courts of that era, who had the advantage of more intimate knowledge of the intent of the legislature at the time of the passing of the Fourteenth Amendment, were of the judicial opinion that such did not invalidate anti-miscegenation statutes. The state further urges that the issue of the effect of the Fourteenth Amendment on anti-miscegenation laws is not present in the instant case, because the trial court's removal of the possible defense of a common-law marriage in this state was legally justified on an entirely distinct basis, to wit: the defendants had not carried the burden of proving such negative and were therefore not entitled to such defense. Insomuch as there is a correct basis for negating the defense of having formulated a common-law marriage in the State of Florida, the fact that the court cited an erroneous reason for the correct deprivation is of no consequence.

With regard to issue (2), the appellee urges that appellants are in error in their assertion that Florida has not made habitual cohabitation a crime when such act is committed by unmarried members of the same race. Section 798.02, Florida Statutes, prohibits lewd and lascivious behavior and it will be demonstrated that habitual cohabitation by unmarried members of the same race is punishable under such section. It will further be demonstrated that the permissible punishment under Section 798.02, supra, is at least as great

as the maximum punishment provided by Section 798.05, under which appellants were charged.

With regard to issue (3), the state will point out that Florida law provides that one who does not argue and brief an assignment of error during appeal is considered to have abandoned such error. The state will demonstrate that appellants did not argue in the Florida Supreme Court the ambiguity of the Florida statute, and therefore there was adequate state ground for concluding against appellants on the question of whether the statute was ambiguous, such ground being that the question was not properly before the court.

It is further urged that an unbroken line of decisions as well as practices has recognized that the term "negro" has at least as much clarity as the term 'obscene", which latter term has been recognized as not being so ambiguous as to leave a statute using such term unconstitutional.

It is further to be pointed out that many cases have upheld statutes wherein the term "negro" was totally undefined, whereas in Florida such term is clearly defined to a mathematical exactness and therefore, a fortiori, a statute wherein the term "negro" is concisely defined is not, as a matter of constitutional law, ambiguous.

The state will present as a collateral argument the issue that the Fourteenth Amendment was proposed

in violation of Article V of the federal constitution, because ⅔ of the Senate did not approve such proposal. It will be urged that a decision upholding the adoption of the Fourteenth Amendment will jeopardize the immediate power of the United States Supreme Court itself, because it would support the proposition that 51% of the members of the federal legislative houses could bind together to unseat the other 49%, and then propose a constitutional amendment to place federal judicial power in the state courts. It is clear that the subject matter of such amendment would assure quick ratification by the state legislatures. It is submitted that the purpose of the constitution is to insure stability and to guarantee against such occurrences, and that such purpose can only be assured by a holding that the proposal of the Fourteenth Amendment was improper, invalid, and ineffective.

ARGUMENT

QUESTION I

WHETHER THE FOURTEENTH AMENDMENT AFFECTS THE STATE ANTI-MISCEGENATION STATUTES.

A cardinal rule involved in the interpretation or construction of the Constitution or one of its provisions is that:

" . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[1]

Furthermore, in interpreting or construing,

"nothing new can be put into the constitution except through the amendatory process. Nothing old can be taken out without the same process."[2]

The three constitutional amendments which grew out of the War Between the States were designed to limit the powers of the State. The previous amendments limited the powers of Federal Government.

The Fourtenth Amendment grew out of the Civil Rights Act of 1866 and its forerunner, the Freedmen's Bureau Bill. It therefore becomes necessary that the debates in the 1st Session of the 39th Congress (1865-1866) be researched in order to determine the meaning of the pertinent language of the Fourteenth Amendment as understood by its authors and its proponents.

The first material occurrence was the introduction of the supplemental Freedmen's Bureau Bill.[3] This bill was the first reconstruction proposal and was

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[1] **Adamson vs. People of California,** 332 U.S. 46, 72, (1947). **Ex Parte Bain,** 121 U.S. 1, 12, (1887).

[2] **Ullmann vs. United States,** 350 U.S. 429, 501, (1956)

[3] S. 60, 39th Congress, 1st Session (1866).

a forerunner of the Fourteenth Amendment. It was introduced as a supplement to the original Freedmen's Bureau Bill enacted in March, 1865. The original protected only those Negroes who had been freed in territory under federal control. The supplemental bill, as reported by the Judiciary Committee of the Senate, contained a number of sections, the first six of which authorized the division of the seceding states into districts, the appointment of commissioners, the reservation of land, and the awarding of such lands to loyal refugees and freedmen.

The seventh section contained language which, by way of the Civil Rights Act, subsequently became a part of the Fourteenth Amendment. It provided, in part, that if, because of any state or local law, custom or prejudice:[4]

> "... any of the civil rights of immunities belonging to white persons, including the right to make and enforce contracts . . . and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . on account of race . . . it shall be the duty of the President of the United States, through the Commissioner, to extend military protection . . . over all cases affecting such persons so discriminated against."

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[4] Senate Document, 39th Cong., 1st Session, Ex Doc. No. 24, p. 9.

Section 8 made it a misdemeanor for any person to subject any other person on account of color:[5]

> " . . . to the deprivation of any civil right secured to white persons, or to any different punishment . . . ".

These provisions of the bill were applicable only to those states or districts where the ordinary course of judicial proceedings had been interrupted by war. Tribunals consisting of officers and agents of the Bureau were to try all offenses.[6]

Senator Thomas A. Hendricks of Indiana, an opponent of the Bill, expressed the fear in the Senate debates that the "civil rights or immunities" clause in the seventh section would nullify many salutary laws of Indiana, including an Indiana constitutional provision which provided that no Negro man should be allowed to intermarry with a white woman. He then said:[7]

> "Marriage is a civil contract, and to marry according to one's choice is a civil right. Suppose a State shall deny the right of amalgamation, the right of a negro man to intermarry with a white woman, then that negro may be taken under the mili-

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[5] Ibid.

[6] Ibid. See also, Cong. Globe, 39th Cong., 1st Sess. (1866) 209-10.

[7] Cong. Globe, 39th Cong., 1st Sess. 318 (January 19, 1866).

tary protection of the Government; and what does that mean? . . . Does it mean that this military power shall enforce his civil right, without respect to the prohibition of the local law? In other words, if the law of Indiana, as it does, prohibits under heavy penalty the marriage of a negro with a white woman, may it be said a civil right is denied him which is enjoyed by all white men, to marry according to their choice, and if it is denied, the military protection of the colored gentlemen is assumed, and what is the result of it all? I supose they are then to be married in the camp of the protecting officer without regard to the State laws. . . . "

Senator Lyman Trumbull of Illinois, who had introduced the Bill and was its manager, made it clear that there was no intention to nullify the anti-miscegenation statutes or constitutional requirements of the various states or to restrict such future legislation as to miscegenation. On that point he said:*

" . . . But, says the Senator from Indiana, we have laws in Indiana prohibiting black people from marrying whites, and you are going to disregard these laws? Are our laws enacted for the purpose of preventing amalgamation to be disregarded, and is a man to be punished because he undertakes to enforce them? I beg the Senator from Indiana to read the bill. One of its objects is to secure the

* Cong. Globe, 39th Cong., 1st Sess. 322 (January 19, 1866).

same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and vice versa? I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races. This bill does not interfere with it. If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain."

A week later Senator Garrett Davis from Kentucky likewise expressed the fear that the language of Section 7 was broad enough to strike down the anti-miscegenation laws of the State of Kentucky.[9]

Senator Trumbull replied:[10]

". . . The Senator says the laws of Kentucky forbid a white man or woman marrying a negro, and that these laws of Kentucky are to exist forever;

[9] Cong. Globe, 39th Cong., 1st Sess., 418.
[10] Cong. Globe, 39th Cong., 1st Sess., 420.

that severe penalties are imposed in the State of Kentucky against amalgamation between the white and black races. . . .

"But, sir, it is a misrepresentation of this bill to say that it interferes with those laws. I answered that argument the other day when it was presented by the Senator from Indiana. The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discriminations in punishments on account of color; and unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law."

The supplemental bill passed the Senate on January 25, 1866, by a vote of 37 to 10, three absent.

On the same day the Bill was sent to the House of Representatives, but on the following day Senator Johnson from Maryland made a motion to reconsider requesting that the Secertary of the Senate ask for the return of the Bill from the House of Representatives. Senator Johnson's motion was defeated 22 to 18.

While the Bill was under consideration in the House of Representatives, on February 3, 1866, Representa-

tive Samuel W. Moulton from Illinois demonstrated the inapplicability of the language of the bill to state laws forbidding miscegenation or interracial marriages. In part he said:[11]

> "My colleague says that . . . it is a civil right for a black man to marry a white woman. . . . I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman. . . . It is a matter of mutual taste, contract, and understanding between the parties. . . . The law, as I understand it, in all the States, applies equally to the white man and the black man, and there being no distinction, it will not operate injuriously against either the white or the black. . . .
>
> "I understand that the civil rights referred to in the bill are not of the fanciful character referred to by the gentleman, but the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts. These are the great civil rights that belong to us all, and are sought to be protected by this bill."

Thereupon, the following colloquy occurred:[12]

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[11] Ibid., p. 632 (Feb. 3, 1866).

[12] Ibid., p. 632, 633 (Feb. 3, 1866).

"Mr. THORNTON. On the point upon which my colleague is now speaking, civil rights, I would ask him if a marriage between a white man and a white woman is a civil right?

"Mr. MOULTON. It is not a civil right.

"Mr. THORNTON. It is not?

"Mr. MOULTON. No, sir, not in my opinion.

"Mr. THORNTON. Then what sort of a right is it?

"Mr. MOULTON. Marriage is a contract between individuals competent to contract it.

"Mr. THORNTON. Is it a political or civil right?

"Mr. MOULTON. It is a social right. I understand that a civil right is a right that a party is entitled to and that he can enforce by operation of law.

"Mr. THORNTON. I would ask my colleague if marriages are not contracted in all the States of this Union by virtue of provisions of law?

"Mr. MOULTON. I think, perhaps, they are to a greater or less extent.

"Mr. THORNTON. It is not especially provided for by the law regulating it. The right to marry is a right which cannot be enforced.

There are a great many things a man can do that are imperfect obligations which cannot be enforced by law, and hence are not civil rights contem-

plated by this bill. . . . The remarks that I made in connection with this matter were made for this purpose: I say that the right to marry is not strictly a right at all, because it rests in contract alone between the individuals, and no other person has a right to contract it. It is not a right in any legal or technical sense at all. No one man has any right to marry any woman he pleases. If there was a law making that a civil right, then it might be termed a civil right in the sense in which it is used here. But there being no law in any state to that effect, I insist that marriage is not a civil right, as contemplated by the provisions of this bill. . . ."

On the same day, Hon. L. H. Rousseau of Kentucky, expressed the fear that under the proposal a minister might be arrested for refusing to solemnize marriages between whites and negroes.[13]

He was answered on the same day by Hon. C. E. Phelps of Maryland, even though he himself opposed the bill as written and desired amendments:[14]

"- - - Efforts have been made, and very ingeniously, by gentlemen opposed to the bill, - - - by arguing from the language used in the seventh and eighth sections an inference of a design to control state laws in respect to the marriage relation. Such a

[13] Appendix to the Congressional Globe, 39th Cong., 1st Sess. (p. 69).

[14] Ibid., p. 75.

construction is not warranted by the terms employed. - - -"

After final passage, the Freedmen's Bureau Bill was vetoed on February 19th, 1866.[15] The veto was sustained February 2, 1866.

In a slightly modified form, the Bill was later reenacted over the veto of the President.[16]

The Senate then proceeded to consider the proposed Civil Rights Act which was under the same management. The first section contained the following language:[17]

> "The inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance,

[15] Cong. Globe, 39th Cong., 1st Sess., p. 916.
[16] 14 Statutes 173 (1866).
[17] Ibid., p. 504.

regulation, or custom, to the contrary notwithstanding."

It also provided that:[18]

"- - - there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery."

Again Senator Johnson expressed his misgivings about the possible effect of this act on the miscegenation statutes of the States. Among other things he said:[19]

"There is not a State in which these Negroes are to be found where slavery existed until recently, and I am not sure that there is not the same legislation in some of the States where slavery has long since been abolished, which does not make it criminal for a black man to marry a white woman, or for a white man to marry a black woman; and they do it not for the purpose of denying any right to the black man or to the white man, but for the purpose of preserving the harmony and peace of society. The demonstrations going on now in your free States show that a relation of that description cannot be entered into without producing some disorder. Do you not repeal all that legislation by this bill? I do not know that

[18] Ibid., p. 505.
[19] Ibid., p. 505.

you intend to repeal it; but is it not clear that all such legislation will be repealed, and that consequently there may be a contract of marriage entered into as between persons of these different races, a white man with a black woman or a black man with a white woman? - - - "

Thereupon, Senator William Pitt Fessenden, of Maine, asked:[20]

"Where is the discrimination against color in the law to which the Senator refers?"

The following colloquy then took place:[21]

"Mr. JOHNSON. There is none, that is what I say; that is the very thing I am finding fault with.

Mr. TRUMBULL. This bill would not repeal the law to which the Senator refers, if there is no discrimination made by it.

"Mr. JOHNSON. Would it not? We shall see directly. Standing upon this section, it would be admitted that the black man has the same right to enter into a contract of marriage with a white woman as a white man has, that is clear, because marriage is a contract. I was speaking of this without a reference to any State legislation.

"Mr. FESSENDEN. He has the same right to make a contract of marriage with a white woman that a white man has with a black woman.

[20] Ibid., 505, 506

[21] Ibid., p. 505, 506.

"Mr. JOHNSON. - - - But whether I am wrong or not, upon a careful and correct interpretation of the provisions of these two sections, I suppose all the Senate will admit that the error is not so gross a one that the courts may not fall into it. Then what is the result? The whole of this legislation to be found in almost every State in the Union where slavery has existed, and to be found, I believe, in several of the other States, is done away with. You do not mean to do that. I am sure the Senate is not prepared to go to that extent; and I submit to the honorable chairman, without proclaiming myself to be right beyond all possible question of doubt, which would be in bad taste, and certainly very far from what I am disposed to do when I find that a different opinion is entertained by two gentlemen whose opinions I hold in so much respect - I submit to the honorable chairman of the Judiciary Committee whether he had not better make it so plain that the difficulty which I suggest in the execution of the law will be obviated. - - -."

The Civil Rights Act of 1866 passed the Senate on February 2nd by a vote of 33 to 12.[22] On March 13th with a few minor changes, it passed the House of Representatives by a vote of 111 to 38.[23] The House amendments were adopted in the Senate without debate.[24]

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[22] Ibid., p. 916, (Feb. 19, 1866).

[23] Ibid., p. 1367.

[24] Ibid., p. 1367.

On March 27, 1866, President Johnson returned the Bill to the Senate without his approval.[25] His veto message contained objections to the Bill, section by section. With respect to the anti-miscegenation laws of the states, he said:[26]

> "In the exercise of State policy over matters exclusively affecting the people of each State, it has frequently been thought expedient to discriminate between the two races. By the statutes of some of the States, northern as well as southern, it is enacted, for instance, that no white person shall intermarry with a negro or mulatto. Chancellor Kent says, speaking of the blacks, that 'marriages between them and the whites are forbidden in some of the States where slavery does not exist, and they are prohibited in all the slaveholding states, and when not absolutely contrary to law, they are revolting, and regarded as an offense against public decorum.'
>
> "I do not say this bill repeals State laws on the subject of marriage between the two races, for as the whites are forbidden to intermarry with the blacks, the blacks can only make such contracts as the whites themselves are allowed to make, and therefore cannot, under this bill, enter into the marriage contract with the whites.— " - - - If it be granted that Congress can repeal all State laws discriminating between whites and

[25] Ibid., p. 1679.
[26] Ibid., p. 1680.

blacks in the subjects covered by this bill, why, it may be asked, may not Congress repeal in the same way all State laws discriminating between the two races on the subjects of sufferage and office? If Congress can declare by law who shall hold lands, who shall testify, who shall have capacity to make a contract in a State, then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold any office, and finally, to vote in every State and Territory of the United States. As respects the Territories, they come within the power of Congress, for as to them, the law-making power is the Federal power; but as to the States no similar provisions exist, vesting in Congress the power to make rules and regulations for them. - - -"

The Act was vetoed by President Johnson on March 27, 1866.[27] The veto was overriden in the Senate, 33 to 15, on April 6, 1866,[28] and was overriden in the House 122 to 41 on April 9, 1866.[29]

So far as our research discloses, all of the proponents of the supplemental Freedmen's Bureau Bill and the Civil Rights Act of 1866 were of one accord in insisting that there was nothing in those acts that could possibly be constructed as nullifying the anti-miscegenation laws of the various states. As we have

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[27] Ibid., p. 1679.
[28] Ibid., p. 1809.
[29] Ibid., p. 1861.

seen, by March 27, 1866, the fears that the anti-miscegenation statutes would be repealed had so far vanished that President Johnson dismissed the objection as frivilous.

The supplemental Freedmen's Bureau Bill and the Civil Rights Act were taken up, debated and passed before the resolution proposing the Fourteenth Amendment came before the Congress for debate, but all had the same management and a part of the same package. The proposal to amend the Constitution preceeded the passage of the Bill and the Act, but the debates on the proposed amendment came after consideration of the two.

When the 39th Congress convened in December 1865, Thaddeus Stevens, a Pennsylvania representative, proposed the creation of a joint committee on reconstruction consisting of six senators and nine representatives.[30] This proposal was adopted and the committee of fifteen prepared the resolution that was finally proposed as the Fourteenth Amendment. The debates on the supplemental Freedmen's Bureau Bill and the Civil Rights Act therefore serve to refine and define the language that later went into the Fourteenth Amendment. As is well known, the purpose of the Fourteenth Amendment was to confer power upon the Congress to enact such laws as were em-

[30] Ibid., p. 6 (1865).

bodied in the Bill and the Act. For example, on May 8, 1866, Thaddeus Stevens said that Section 1 of the proposed amendment and its other provisions:[31]

> '- - - all are asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. - - - Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed - - -"

Representative Thaddeus Stevens thus contended that the purpose of the first section of the amendment was to write the Civil Rights Act into the Constitution without in any wise adding to the rights protected by the Act. Mr. Stevens discussed in specific terms: punishment for crime, means of redress, protective laws and the testimony in court, all of which were

[31] Cong. Globe, 39th Cong., 1st Sess., p. 2459.

listed in the Act; he never hinted at any idea of broader application.

Representative William E. Finck of Ohio then stated that if the first section of the proposed amendment was necessary, the Civil Rights Act was unconstitutional.[32]. His colleague from Ohio, Representative James A. Garfield, disagreed, saying that the purpose of the first section of the Amendment was to prevent the repeal of the Civil Rights Act saying:[33]

> "The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for the reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here."

Representative M. Russell Thayer of Pennsylvania agreed with Mr. Garfield, saying:[34]

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[32] Cong. Globe., 1st Sess., p. 2460-1.
[33] Ibid., p. 2462.
[34] Ibid., p. 2465.

"As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, and that, not as the gentleman from Ohio (Mr. Finlck) suggested, because in the estimation of this House that law cannot be sustained as constitutional, but in order, as was justly said by the gentleman from Ohio who last addressed the House, (Mr. Garfield,) that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States."

Mr. Benjamin M. Boyer, of Pennsylvania, opposed the proposed amendment stating as one reason:[35]

"the first section embodies the principles of the civil rights bill - - - "

Representative Henry J. Raymond of New York, Publisher of the **New York Times**, had been opposed to the Civil Rights Act because of its doubtful constitutionality. As to he proposed constitutional amendment, he said:[36]

"And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."

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[35] Ibid., p. 2467.

[36] Ibid., p. 2502.

The foregoing illustrates the view of the framers of the Fourteenth Amendment in the House that the purpose of the first section of the Amendment was to place the provisions of the Civil Rights Act of 1866 beyond the reach of legislative repeal. That is the verdict of history, based on the facts material to the issue.[37]

The resolution proposing the Fourteenth Amendment was adopted by the House of Representatives on May 10, 1866, by a vote of 128 to 37. The bill was called up for debate in the senate, on May 23, 1866.[38] Senator Jacob M. Howard of Michigan took the lead in presenting the resolution since Senator Fessenden of Maine, the Chairman of the Committee on Reconstruction, had not been well. He spoke at length on "privileges and immunities", as this clause, he apparently thought, contained the gist of Section 1. He considered this phrase incapable of accurate definition, but listed a great many that he thought it included. These were the first eight amendments of the Constitution together with some even less well defined privileges and immunities included in Article IV, Section 2. Despite the long list that he gave, a right to marry across lines of race and color was never mentioned. He went on:[39]

[37] Ten Brock, **The Anti-Slavery Origins of the Fourteenth Amendment,** (1951) 183; Flack, **The Adoption of the Fourteenth Amendment** (1909) p. 81, 212.

[38] Cong. Globe, 39th Cong., 1st Sess., p. 2763.

[39] Ibid., p. 2766.

> "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect those great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment. - - - Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these gurantees, a power not found in the Constitution."

But again, these guarantees have no reference to anti-miscegenation laws.

Senator Howard made clear his views on the last portion of the first section. He said that this portion:[40]

> "- - - does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."

That is the general field in which the due process and equal protection clauses operate. They were not designed to wipe out all distinctions or discriminations

[40] Ibid., p. 2766.

based on race or color. Senator Howard made this clear by his reference to the right to vote:[41]

> "But, sir, the first section of the proposed amendment does not give to either of these classes the the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism."

Is a right to enter into an interracial marriage one of those "fundamentals rights"? Is it more "fundamental" than the right to vote? Howard could not have thought so. As to voting rights under Section 2, he said:[42]

> "It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several Staes at all; nor does it recognize, much less secure the right of sufferage to the colored race. I wish to meet this question fairly and frankly; I have nothing to conceal upon it; and I am perfectly free to say that if I could have my own way, if my preferences could be carried out, I certainly should

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[41] Cong. Globe, 39th Cong., 1st Sess. (1866) p. 2766.
[42] Ibid., p. 2766.

> secure suffrage to the colored race to some extent at least; - - - The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race."

Howard spoke also of the last section of the proposed Amendment. He added that Section 5 gave Congress power to pass laws,[43]

> " - - - appropriate to the attainment of the great object of the amendment."

Senator Benjamin L. Wade of Ohio on May 23, moved a substitute which contained the germ of the definition of citizenship.[44] Further consideration was then postponed.

The Senate Republicans went into caucus where no doubt most of the basic differences were threshed out. Of the debates there we have no record. On May 29, the Senate returned to a consideration of the proposed amendment. Senator Howard at once offered a series of amendments, the product of the caucus.[45]

[43] Ibid., p. 2766.
[44] Ibid., p. 2768.
[45] Ibid., p. 2869.

The only amendment proposed for Section 1 was the addition of the clause defining citizenship.

When asked as to the purpose of the proposed amendment, on May 30th, Howard said:[46]

> "We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power - - -"

Some debate followed on the citizenship provisions. Then Senator James R. Doolittle of Wisconsin asserted that the Amendment was designed to validate the Civil Rights Act.[47] Senator Fessenden denied that he had heard such a purpose mentioned in the Committee, but he had missed many sessions and Senator Howard interposed to remark that the purpose of the amendment was to prevent the repeal of the Civil Rights Act.[48]

Senator Luke P. Poland of Vermont made a speech in which he stated that the purpose of Section 1 was to permit Congress to prohibit State interference with the privileges and immunities referred to in Article IV, Section 2.[49] He admitted that the proposed amendment would not confer suffrage on the Negro. Senator William M. Stewart of Nevada renewed the

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[46] Ibid., p. 2896.
[47] Ibid., p. 2896.
[48] Ibid.
[49] Ibid., p. 2961.

general theme that the proposed amendment was designed to put the Civil Rights Act in the Constitution.[50]

Senator Garrett Davis of Kentucky, an opponent of the proposed amendment, spoke at length. He expressed the view that the amendment was designed to provide constitutional support for the Civil Rights Act.[51] He was followed by Senator John B. Henderson, a Republican from Missouri. He implied that the proposed amendment would accomplish only the same result as the Civil Rights Act.

Thus the verdict of the House and history was affirmed in the Senate debates. The vote was then taken - June 8, 1866 - and the resolution was adopted by a vote of 33 to 11.[52]

The resolution went back to the House for concurrence in the Senate amendments. Debate was limited to one day. Mr. Rogers stated that the resolution "embodied the gist of the civil rights bill."[53] The House concurred with the Senate amendments on June 13 by a vote of 120 to 32.[54]

Thus, we have covered the ground and must conclude that the friends and foes of the Fourteenth Amendment, who spoke on the subject, were of the opinion that the purpose of the amendment was

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[50] Ibid., p. 2964.
[51] Id. at App. p. 240.
[52] Id. at p. 3042.
[53] Id. at App. p. 229.
[54] Id. at p. 3149.

to validate the provisions of the Civil Rights Act and place them beyond the power of the Judiciary to nullify, and the power of the Congress to repeal.

It was the opinion of those who spoke in behalf of the Civil Rights Act that it had no application to marriage contracts, anti-miscegenation statutes or the right of suffrage. The proponents of the Civil Rights Act seemed to convince all of the sceptical members of the Congress and President Johnson, as well, that nothing in that Act applied to the antimiscegenation statutes of the states.

Since all the slave states and many of the non-slave states had anti-miscegenation statutes, it would have been strange if a majority of the members of the Congress from those latter states had intended to authorize the Congress or the courts to nullify that which their constituency favored.

However, a majority favored extending to Negroes - not the right to vote - but the right not to be discriminated against in voting. Nothing in the Civil Rights Act, legitimatized by the Amendment, nor in the Amendment itself, accorded the right to vote or, as some thought, the right not to be discriminated against in the application of voting laws, it was necessary to frame and adopt the Fifteenth Amendment in order to accomplish the objective left untouched by the Fourteenth. In a few words the right to racially integrate at the altar or in bed might have been constitutionalized in the Fourteenth or the Fifteenth

Amendment. Such was not done. Had it been done, surely the Amendments would have lost.

If "we are to place ourselves as nearly as possible in the condition of the men who framed" the Fourteenth Amendment, we know that nothing in that Amendment, so interpreted, authorizes federal interference with the anti-miscegenation laws of the states. If "nothing new can be put into the Constitution except through the amendatory process", as was true in 1866, as was true in 1956, and as is true now, the current attacks on the miscegenation statutes of Florida must surely fail.

It has been held that the intent of the state legislatures in ratifying proposed amendments to the United States Constitution is controlling, rather than the intent of the federal legislature in proposing such amendments (see **Kennedy vs. Walker**, 63 A.2d, 589, 135 Conn. 262; affirmed 93 L.Ed. 1715, 337 U.S. 901, 69 S. Ct. 1046). If the intent of the state legislatures is to be controlling, then certainly the question of whether the Fourteenth Amendment affects state anti-miscegenation laws must be decided against the appellants, because those states which ratified the Fourteenth Amendment clearly stated their intent by the continuation of their state anti-miscegenation laws, contemporaneous with their ratification of the Fourteenth Amendment.

A comparison of the list of states having anti-miscegenation laws, as set out in the appendix to the appellants' brief with the list of states relied on for rati-

fication of the Fourteenth Amendment as set out in **U.S.C.A., Fourteenth Amendment,** reveals that 21 of the 30 states relied on for ratification continued their anti-miscegenation laws and policies after the passage of the Fourteenth Amendment.

The federal courts, within twenty years after the passage of the Fourteenth Amendment, upheld an Alabama statute as valid against a Fourteenth Amendment attack, even though such statute prohibited ninterracial cohabitation and interracial marriage. (see **Pace vs. Alabama,** 106 U.S. 583). In the case of **Ex parte Edmund Kinney,** 14 Fed. Cases 602, 3 Hughes 1, the federal circuit court rendered an opinion within thirty years of the passage of the Fourteenth Amendment that such did not affect state anti-miscegenation statutes. In the case of **Ex rel William B. Hobbs and Martha A. Johnson,** 1 Woods 537, the federal circuit court, in considering a habeas corpus petition submitted by those arrested for violation of state anti-miscegenation laws, found that the Fourteenth amendment, passed four years earlier, did not affect state anti-miscegenation provisions. The rationale of the federal holdings in **Kinney, Hobbs,** and **Pace,** supra, is clearly set out in **State vs. Tutty,** 41 Fed. 753 (1890), wherein it was stated that anti-miscegenation laws were nondiscriminatory because each, or both, races were prohibited from marrying the other, and thus neither was favored.

There have been, of course, numerous state decisions, all of which with the exception of **Perez vs. Sharp,** 32 Cal.2d 711, 198 P.2d 17, have upheld the

anti-miscegenation laws therein being considered. Those which are contemporaneous with the passage of the Fourteenth Amendment are: **Scott vs. Georgia,** 39 Ga. 323 (1869), and **State vs. Gibson,** 36 Ind. 389, 10 American Reports 42 (1871).

We thus see from the above that contemporaneous with the passage of the Fourteenth Amendment, the federal legislative body, the state legislative bodies, the federal judiciary, and the state judiciary each have indicated their belief that the state anti-miscegenation laws were unaffected by the provisions of the Fourteenth Amendment.

A controlling precedent supporting the proposition that the Fourteenth Amendment was not intended to affect the anti-miscegenation laws of the states is furnished by the case of **Name vs. Name,** 87 S.E.2d 749, 197 Va. 80, 350 U.S. 891, 100 L.Ed. 784, 350 U.S. 985, 100 L. Ed. 852. When the **Name** case, supra, was first presented to the Supreme Court of Virginia, such court ruled that the state statute which prohibited interracial marriage did not violate either the federal or state constitutions (87 S.E.2d 749, 197 Va. 80). When such issue was presented through the vehicle of the case to the United States Supreme Court, that Court remanded the case to the State court so that such state court would indicate the true relationships of the parties involved in the case to the State of Virginia (350 U.S. 891, 100 L.Ed. 784). The Virginia court then set out in detail that the parties were so related to the state at the time of formulating the marriage so as to give the Virginia court jurisdiction to question

the validity of such marriage under Virginia law (197 Va. 734, 90 S.E. 2d 849). The basis for questioning the validity of the marriage was that Virginia law prohibited interracial marriage. The Supreme Court of the United States then held, following the determination by the Virginia court, that no federal question was involved in the case (350 U.S. 985, 100 L.Ed. 852). Thus the Supreme Court of the United States held that no federal question was involved in the state statute which prohibited interracial marriage. An analysis of the case reveals that the United States Supreme Court held that the only constitutional question involved was the question of whether the Virginia law was applicable to the formation of the marriage. It is probable that the United States Supreme Court determined that the relationship of marriage is one which is provided for by the state, and that such relationship is not secured by any constitutional guarantee of the federal constitution.

The appellants' assertion that marriage itself is such a fundamental right that it must be considered guranteed by the Fourteenth Amendment is so diluted as to be in a state of no substance whatsoever by the fact that the Fourteenth Amendment was not considered as guranteeing even so fundamental a right as racial sufferage. In addition to the reason previously given that anti-miscegenations Statues are non-discriminatory in that both races are prohibited, the prohibition against interracial marriage can well be supported by the proposition that such prohibition has indicated that races better advance in human

progress when they cultivate their own distinctive characteristics and develop their own peculiarities.

Appellants attempt to rebut such proposition on pages 20 through 23 of their brief by submitting Unesco statements and other materials which support the conflicting proposition that race is a myth rather than a scientific fact. **The Race Concept**—(published by the United Nations, Copyright 1952, Unesco, Paris), a later Unesco publication, provides extensive scientific opinion supporting the proposition that the scientific attributes of race are such as to provide a proper legislative purpose in the prohibition of interracial marriage.

A further basis for finding a proper legislative purpose in enacting anti-miscegenation legislation is the prevention of interracial conflicts which may well result from interracial marriages occuring in communities where such marriages create strong adversity in both the white and the negro race. It is well known that both the white and the negro race tend to shun the off-spring of interracial marriages. Such marriages therefore have the ability of causing such tension as to be conducive to racial conflict; each race resents the invasion. It is further apparent that proper legislative purpose is provided by the need to protect the offspring of marriages. The need of offspring to identify with others is a well understood psychological factor in present times. The interracial offspring are not fully accepted by either race. There is therefore a clear psychological handicap problem among interracial offspring. Since the decision in **Brown vs. Topeka Board of Education,** 347 U.S. 483,

psychological handicaps have been considered of a scientific nature, and clearly the prevention of such undesirable scientific occurrences forms a proper legislative purpose. The appellants' brief gives great emphasis to the proposition that there can be no proper legislative purpose because the races are inherently equal. However, many who consider their racial opposites to be of equal social standing decline to marry such because their interracial offspring will not have the same psychological or social standing that such offspring would have if they were descendants of sexual partners of the same race.

In the case of **Purity Extract and Tonic Company vs. Lynch,** 226 U.S. 192, Justice Hughes set out with clarity that the court has no concern with the wisdom of exercising a particular legislative power; and unless the particular enactment has no substantial relationship to a proper purpose, the court should not declare that the limit of legislative power has been transcended. Justice Hughes goes on to say that the court should not determine whether the use of legislative powers is used wisely as such would be contrary to our constitutional system, and would substitute a judicial opinion for the legislative will. It is therefore submitted that this court should decide adverse to appellants the question of whether the federal constitution prohibits state anti-miscegenation provisions, unless it is conclusively determined that there is no proper legislative purpose to support the enactment of an anti-miscegenation law. Doubt as to whether there is any proper scientific basis or other reason which would provide an adequate legislative purpose goes to the

wisdom of the act. Only if this court determines that there is no reasonable legislative basis for enacting such laws, should such laws be overthrown as unconstitutional under the standards expressed in the Fourteenth Amendment to the Federal constitution.

The rule applicable between the higher courts and the legislative bodies is comparable to that applicable in determining the relationship of power between the higher courts and the jury. If there is any substantive evidence to support the finding of the jury, the finding must be upheld by the higher court; if there is any substantive evidence to support the existence of a valid legislative purpose, then the court should not invalidate the legislative act passed pursuant to such legislative purpose.

In the case of the **United States vs. Bhagat Singh Thind,** 261 U.S. 204, 126 F.2d. 1021, the United States Supreme Court justified the exclusion of the high class of Hindus under the immigration laws as they existed at the time the case arose on the basis that a great body of the people of this country instinctively recognized and rejected the thought of assimulation with Hindus because of the racial differences of the Hindu. The court went on to say that the children of English, French, German, Italian, Scandinavian and other European parentages quickly merge into the mass of our population and loss the distinctive hallmark of their European origin. The court then indicated that it cannot be doubted that children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is submit-

ted that the rationale of such holding and the apparent psychological handicaps of children born of negro-white parentage provide at least a sufficient probability of the existence of a proper legislative purpose as to support a holding that the present anti-miscegenation laws of the State of Florida are supported by proper legislative purpose so as not to be subject to the indictment that they are unconstitutional because of being arbitrarily discriminatory in violation of the prohibitions of the Fourteenth Amendment. Such conclusion was reached as late as 1944 in the case of **Stevens vs. U.S.**, 146 F.2d. 120, wherein a state law prohibiting negro-white marriages was held not to violate the Fourteenth Amendment to the United States constitution.

All applicable medical treatises support the proposition that sickle-cell anemia is found almost exclusively among the negro population. Certainly if a drug was found which prevented common colds but which caused sickle-cell anemia among negroes, this Court would uphold state legislation which permitted doctors to inject such drug into white persons, but which prohibited doctors from injecting such drug into negroes. Such hypothetical statute may have forgotten to be racially colorblind, but neverthless the proper legislative purpose causes the racial discrimination to be secondary and to have no constitutional effect.

The appellee submits that there is sufficient proper legislative purpose in enacting anti-miscegenation laws to cause the racial aspects of such laws to be secondary and to have no constitutional significance.

QUESTION II

WHETHER THE QUESTION OF THE CONSTITUTIONAL VALIDITY OF STATE ANTI-MISCEGENATION LAWS IS PRESENT IN THE INSTANT CASE.

The only evidence which even intimates the existence of a marrage between the appellants is provided by the testimony of Mrs. Dora Goodnick and Dorothy Kaabe. Mrs. Goodnick testified that in February of 1961 Connie Hoffman stated that she was married to the white man Hoffman, who was accompanying her at such time (R 22). She further testified that in October of such year the defendant Hoffman said she was married to the defendant McLaughlin (R 23).

Dorothy M. Kaabe's testimony lacks clarity. She stated that the defendant Hoffman told her that she lived with a Mr. Gonzalez in 1956, but that she could not marry him because she had never had a legal divorce; that she lived with Mr. Hoffman as late as October 1959; that she then lived with Mr. McLaughlin as his common law wife and that she had no legal marriage to him (R 83, 84.)

Neither Mrs. Goodnick nor Mrs. Kaabe ever testified that the defendants were married, and there is no other evidence in this case to establish such fact. They testified only that she told them she was married. There was ample evidence indicating that the defendants were NOT married; however, such evidence is of no legal materiality in considering the question of

whether the defendants were entitled to have the question weighed by the jury. If the defendants were so entitled, then the jury instruction by the trial court that common-law marriage could not be formulated between the defendants in this state would probably be an adequate foundation for the question of the validity of the Florida anti-miscegenation laws; the state, however, is not required to prove the absence of a marriage between the defendants because the state is not required to prove the negative where the positive may be easily proven by the defendants, and such negative is almost impossible to be proven. This rule was recognized by this court in the case of **Rossi vs. United States**, 289 U.S. 89, 77 L.Ed. 1051, when Rossi was prosecuted for possession and control of an unregistered still, this court ruled that the prosecution did not have to prove that the still was unregistered.

Another decision directly controlling is provided by the case of **U.S. vs. Pape**, 144 F.2d 778. Pape was prosecuted for transporting a woman in interstate commerce for immoral purposes. Under the circumstances of the case, an existing marriage between the defendants would have been a complete defense, since Pape's purpose was to pay the woman to engage in sexual relations with him. The federal circuit court of the second judicial circuit ruled that the prosecution did not have to undertake the impossible burden of proving that the defendants had no existing marriage. The logic of such decision and its applicability to the instant case are readily discerned if we consider that in order to prove the non-existence of even a formal marriage the prosecution may conceivably be required

to prove that the defendants have at no time married in any place (including foreign countries). Such requirement would render impossible successful prosecution while the counter requirement that the defense make some proof of the positive causes no hardship on the defendants. The prosecution may have even greater difficulty in proving the non-existence of a common law marriage as compared with proving the non-existence of a formal marriage. The greater difficulty is caused by the distinguishing feature that common-law marriages are not recorded, and therefore the prosecution would have to negate the effect of the acts and intents of the accused at all places and all times. These considerations have led to extensive judicial support of the state's position that the non-existence of marriage does not have to be proven. (In addition to the **Rossi** and **Pape** cases, supra, note **State vs. McDuffie,** 107 N.C. 885, 12 S.E. 83; **State vs. Naylor,** 68 Okla. 139, 136 P. 889; **People vs. Cotton,** 2 Utah, 457; **Grace vs. State,** 55 So. 2d 495, 212 Miss. 784; 53 **C.J.S., Lewdness, Section** 5).

The appellants urge that the law of Florida requires the prosecution to prove absence of marriage regardless of the feasibility of so doing. They urge the case of **Orr vs. State,** 129 Fla. 398, 176 So. 510, as support of such allegation. Appellants urge other cases in support of the general proposition that the state must prove each and every essential element of the offense but such are only applicable if non-marriage is an essential element required to be so proven. The appellee will demonstrate that the law of Florida supports the rationale that the prosecution does not have

to undertake the impossible task of negating the existence of a marriage between the defendants under the circumstances which are herein present, i.e., that the defendants could readily prove the positive of the question of marriage if such was a fact.

First to dispense with the appellants' use of Orr vs. State, supra; the appellants apparently rely on the following language:

> "(1) It is the contention of counsel for plaintiff in error that the State of Florida failed and otherwise omitted to prove and establish that the plaintiff in error was not the wife of Nathaniel Thompson. The information, supra, charges and the burden of proof rests upon the State of Florida to show that the relation of husband and wife did not exist between plaintiff in error and Nathaniel Thompson. This question is squarely raised by counsel for plaintiff in error and is the pivotal point in this suit. The plaintiff in error is a colored woman and asserts she was, . . . " (176 So., text 511).

It is probable that that part of the above quote relied on by the appellants is only part of the question submitted by the appellants Orr, rather than the opinion of the author of such opinion. Such is clearly indicated by the fact that the opinion proceeds to rely on the fact that the defendant submitted evidenec clearly sufficient to establish the existence of a marriage and there was no legally sufficient counter evidence submitted by the state. The court concluded that the

verdict was contrary to the evidence, and stated that the facts of the case should be submitted to a new jury. Furthermore, even if the written opinion favored the proposition that the state had to prove the absence of a marriage, such would not be precedent because a majority did not concur in such decision. The Florida Supreme Court has conflict certiorari jurisdiction in cases of conflict arising out of the district courts of appeal of this state (Article V, Section 4, of the Florida constitution). Conflict jurisdiction is founded on conflict in precedent, and is not based on concern of the rights of the individual parties (See **Ansin vs. Thurston,** 101 So. 2d 808). When a specific opinion is not directly concurred in by a majority of the court, such opinion does not form a basis for conflict because of the absence of precedent. This proposition is conclusively supported by the Supreme Court of this state in remanding the decision rendered by the district court of appeal in the case of **Solomon vs. Sanitarians' Registration Board,** 147 So. 2d 132 because a majority of the judges failed to directly concur in any written opinion, though concurring in the affirmance. Only three out of six judges concurred in the **Orr** opinion, supra.

The **Orr** decision was rendered prior to the enactment of Florida's Criminal Code (Chapter 19554, Acts of 1939). In the case of **Gurr vs. State,** 7 So. 2d 590, the Florida Supreme Court noted the decisions rendered prior to the enactment of the Code dealing with the question of what elements needed to be alleged in an indictment, and indicated that the requirements

were less stringent after the enactment of the criminal code, and that decisions rendered prior thereto were not necessarily controlling. Insomuch as that which need not be alleged in the charge generally need not be proved, the **Gurr** decision is applicable to the question of what elements must be proved by the state. The court held that Gurr was adequately charged with an offense of practicing dentistry without a license, even though the state did not aver that he was not exempted from the licensing requirement.

In **Ferrell vs. State**, 34 So. 220, 45 Fla. 26, the court held that during a bigamy prosecution the state did not have to allege the absence of the defensive circumstance of the prior spouse's being absent for three continuous years. In **Butler vs. Perry, 67 Fla.** 405, 66 So. 150, the defendant was charged for violating a statute, the body of which required every ablebodied man to work on the public roads. Later clauses of this act set out what constituted a disabled person. The indictment, which did not allege that the defendant was ablebodied was upheld by the Florida Supreme Court.

The Florida Supreme Court recognized the difficulty of proving the negative in the case of **J. J. Carter Furniture Company vs. Banks,** 11 So. 2d 776. The court held in such case that the party alleging the invalidity of a second marriage on the basis of the continuation of a previously existing marriage must prove the lack of termination of the first marriage. Such holding, however, is only applicable where there

is substantive evidence of the existence of the second marriage. Such evidence is lacking in the instant case.

The appellee, as an officer of the court, wishes to acknowledge that the Florida cases of **Butler, Gurr,** and **Ferrell,** supra, which support the proposition that the prosecution does not have to negate the existence of defensive exceptions, do not directly support the proposition that the state does not have to negate the existence of a marriage. However, such cases are of indirect support by demonstrating that Florida is not adverse to placing a burden of proof on the defendant when judicial precedent merits such action. The out-of-state precedent supporting the proposition that the prosecution does not have to undertake the often impossible ask of negating the existence of a marriage has been provided by the appellee. Appellants have been unable to provide any case wherein a conviction was overthrown on the basis of a valid defense of marriage even though there was no evidence of its existence. The **Orr** case, relied on by appellants, is of no value as precedent, as the evidence conclusively supported the existence of a marriage, and there was no majority decision.

It is submitted that a fair determination would conclude that the out of state authority submitted clearly supports appellee's position. The Florida authority is of a non-conclusive and vague nature. Insomuch as the appellants are carrying the burden, it is submitted that this issue must be decided against them. Appellee therefore concludes that the appellants had the burden of proving that peculiarity within their knowl-

edge, the existence of a common law marriage. The appellee was entitled to an instruction to such effect. The appellee was entitled to a further instruction that **as a matter of law** there was a total lack of evidence (even when all testimony favoring the defense was assumed to be true) supporting the existence of a marriage. Thus, the appellants were not entitled to the defense of marriage and it is of no consequence that the court gave the wrong grounds for the destruction

In its decision rendered in **Durley vs. Mayo,** 351 U.S. 277, 100 L.Ed. 1178, 76 S. Ct. 806, the United States Supreme Court indicated that where there was adequate state ground to support a state decision, such decision could not be utilized as a vehicle to review constitutional questions in the United States Supreme Court even though in the absence of such adequate state ground such questions might have been presented and subject to proper review. **Section 924.33,** Florida Statutes, directs the appellate courts of this state not to reverse a criminal conviction unless errors committed by a trial court are of a harmful nature. Such section further provides that error shall not be presumed. An instruction which had the result of denying the defendants the defense of marriage, because of the provisions of the state anti-miscegenation laws, could not constitute harmful error when the defendants, because of other reasons, were not entitled to the defense of marriage.

Section 918.10, Florida Statutes, provides another adequate state ground for the Supreme Court's failure to reverse the case because of the jury instruction con-

cerning the anti-miscegenation laws of this state. Section 918.10, Florida Statutes, provides that no party may assign as error or grounds of appeal the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. The present record before the court is devoid of any evidence that an objection was made to the instruction that the defendants could not validly contract a common-law marriage in this state. Because of the failure to object, the issue involving the correctness of the instruction was never presented to the trial court and therefore the appellate court was not provided with grounds for reversal even if the instruction was incorrect because the trial court could not err on issues not presented or considered.

QUESTION III

WHETHER THE DEFENDANTS, BY BEING PROSECUTED UNDER A STATUTE WHICH PROHIBITS INTERRACIAL COHABITATION, WERE DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, AS SUCH TERMS ARE ENCOMPASSED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This argument is responsive to that argument given in appellants' brief under question one. This question is clearly concluded against the appellants by the case of **Pace vs. Alabama,** 106 U.S. 583, 27 L.Ed. 250, 1 S.Ct. 489. The **Pace** decision was rendered within fifteen

years of the passage of the Fourteenth Amendment. The decision adopts the same rationale urged by the federal legislature when adopting the Fourteenth Amendment as demonstrated in question one of this brief. The rationale is equally applicable to prohibitions against interracial marriage and to prohibitions against interracial illicit intercourse. The court held that insomuch as the section of the Alabama code which prohibited interracial fornication applied the same punishment to both white and black offenders, there was no discrimination as to either. The court simply adopted the rationale urged by members of Congress when Congress was considering the effects of congressional acts which prohibited racial discrimination. The court is referred to the appellee's argument under question one wherein appropriate citations are given in support of the proposition that members of the national congress felt that prohibitions against interracial discrimination did not affect anti-miscegenation statutes because such statutes were equally applicable to members of each race. It should be noted that the rationale of **Pace** does not conflict with the doctrine that separate facilities are inherently unequal. There is no separate facility involved in a prohibition against interracial illicit cohabitation. The sole facility denied to each race is the state's sanction of interracial marriage. It is clear that if the question presented under point one is answered in favor of the state, and if it is concluded that the Fourteenth Amendment does not prohibit the enactment of anti-miscegenation statutes, it must follow that such amendment does not prohibit the enactment

of statutes prohibiting interracial cohabitation. The power to pass an anti-miscegenation statute is but a power to refuse to sanction the cohabitation acts of the parties. Inherent in the right to refuse to sanction such acts must be the right to punish such acts. Therefore clearly, if the state may prohibit interracial marriage, it may as a corollary thereto prohibit interracial cohabitation. Section 798.05, Florida Statutes, under which the defendants were charged, simply prohibits **habitual** cohabiting of the same room by members of opposite races who are also members of opposite sexes. The terms of Section 798.05, supra, explicitly seek to avoid circumstances wherein there are high potentials of sexual engagement. General intermingling of the races is not prohibited where such potential does not exist. Section 798.02, Florida Statutes, which prohibits intraracial lewd cohabitation, has generally been interpreted as requiring the additional element of sexual occurrence as distinguished from the provisions of Section 798.05, supra, which only require a high potential of such occurrence. The legislative purpose in enacting both Sections 798.02 and 798.05, supra, is to prevent illegal sexual occurrences.

Since Chapter 798, Florida Statutes, clearly undertakes to prohibit both interracial and intraracial illicit sexual activities, it is submitted that the single factor that Section 798.05, supra, does not specifically require proof of an actual act of intercourse is not so great as to become an unwarranted unconstiutional legislative discrimination between those in appellants' class and those in the position of undertaking intraracial

sexual activity. It is pointed out in **McGowan vs. Maryland**, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101, that state legislatures are presumed to have acted within their constitutional powers in spite of the fact that in practice their laws result in some inequality.

Going outside the statutes and into the facts of the case, we find additional evidence that the appellants herein were not placed in unfavored positions. Such appellants were convicted in an area wherein the citizens are metropolitan, sophisticated, and possess a diversified cultural background. The characteristics of such area are generally conducive to racial tolerance and the sentences of appellants reflect such facts; such sentences being a nominal thirty day jail term, and a fine of $150.00. Such resulted because of a violation of basic concepts in sexual decency and not because of any heated passionate reaction based on racial intolerance. The purpose of the legislature in enacting both Sections 798.02 and 798.05, Florida Statutes, was to prevent such breaches of basic concepts of sexual decency whether committed by interracial or intraracial parties.

QUESTION IV

WHETHER THE WORD "NEGRO" AS USED IN SECTION 798.05, FLORIDA STATUTES, RENDERS SUCH SECTION SO AMBIGUOUS AS TO LEAVE APPELLANTS UNNOTIFIED THAT THEIR ACTION WAS PROHIBITED.

The rule prevailing in the jurisdiction of the state of Florida is that errors assigned but not argued are treated as abandoned (**Crawford vs. State,** 86 Fla. 94, 97 So. 288; **Hysler vs. State,** 85 Fla. 153, 95 So. 573; **Burnette vs. Green,** 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; **Thomas vs. State,** 36 Fla. 109, 18 So. 331; **Tracy vs. State,** 130 So. 2d 605).

Contained in the appendix submitted herewith is a copy of the appellants' brief submitted to the Supreme Court of the State of Florida. It is apparent from a reading of such brief that appellants failed to present or argue the question now being set out above as appellee's question four. It is therefore clear, under the above citations, that such question was not properly before the Florida Supreme Court. There was adequate state ground for ruling against the appellants on such question, to wit: such question had been abandoned by their failure to argue such in their brief. It is further pertinent that the petition for rehearing filed by the appellants does not urge the present issue (see R 103).

The gist of appellants' complaint appears to be that Section 798.05, Florida Statutes, when read in conjunction with Section 1.01, Florida Statutes, is too exact in setting out an exact percentage definition of the term "Negro". The mathematical exactness negates the existence of ambiguity. It does not establish it. The controlling question is whether the defendants were possibly led into believing that their act was not prohibited by Section 798.05. It is clear that a thorough consideration of such question leads to but one con-

clusion, to wit: the appellants well understood that their act of continued cohabitation between one who was negro and one who was white was clearly prohibited by the terms of the statute. The evidence adequately reveals that appellants considered themselves to be white and negroid.

In construing statutes, the ordinary meaning of language must be presumed (**Levy's Lessee vs. McCartee,** 31 U.S. 102, 6 Peters 102; **United States vs. Coombs,** 37 U.S. 72). The popular or received import of words furnishes the general rule for interpretation of public laws (**Maillard vs. Lawrence,** 57 U.S. 251). In **Morrison vs. People of the State of California,** 291 U.S. 82, Mr. Justice Cardozo, speaking for the United States Supreme Court, said that white persons within the meaning of the statute therein involved were members of the Caucasian race as Caucasian is defined in the understanding of the mass of men (see also **Wadia vs. United States,** 101 F.2d 7). The **Morrison** case recognizes the term "blood"; it is clear that such term refers to lineal descent rather than any direct biological substance. Thus, the term "blood" as used in Section 1.01, Florida Statutes, is not ambiguous. Such term was used by federal district judge Cushman of Washington in his opinion **In Re Young,** 198 F. 717. Justice Learned Hand himself noted in **In Re Lampitoe,** 232 F. 382, the significance of the term "blood" when given racial application. Justice Story in 1820 upheld a statute against a constitutional attack for vagueness under circumstances where such statute utilized the term "persons of color" (see **United States vs. La Coste,** 26 F. Cases 826).

In **Mercer vs. Reynolds,** 317 Mich. 632, 27 N.W. 2d 40, the term "negro" was held to have a definite meaning as within the general understanding of those who spoke the English language. (See also **Ridgeway vs. Cockburn,** 296 N.Y. Supp. 936.) In the case of **United States vs. Perryman,** 100 U.S. 235, the Supreme Court of the United States distinctly recognized that there was a well understood difference between the terms "negro person" and 'white person" in spite of the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States constitution.

In light of the above authorities, it would appear that statutes which fail to set out with mathematical exactness the percentage of negro lineage necessary to constitute a negro have been held to be valid when attacked for vagueness. It must follow that where a statute specifically specifies its definitions as is the case in Florida (see Section 1.01, Florida Statutes) that such statute should not be invalidated on the grounds that it is too vague to meet constitutional standards. In the case of **Roth vs. United States,** 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S. Ct. 1304, the United States Supreme Court upheld a conviction for having knowingly deposited obscene literature for mailing. The term "obscene" was certainly not subject to any mathematical definition. The court nevertheless held that such term had such a general and well understood meaning that it did not possess the constitutional infirmity of vagueness. The **Roth** decision sets a standard of clarity clearly met by Section 798.05, and Section 1.01 Florida Statutes, which define "Negro" with mathematical exactness.

QUESTION V

WHETHER THE PROVISIONS OF THE ALLEGED FOURTEENTH AMENDMENT OF THE FEDRAL CONSTITUTION WERE VALIDATED AS REQUIRED BY ARTICLE V OF THE UNITED STATES CONSTITUTION.

Appellants' basis of attack against miscegenation and the alleged discriminatory characteristics of Section 798.05, Florida Statutes, must be supported by the provisions of the Fourteenth Amendment if such attack is to be successful. Article V of the federal constitution provides:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by convention in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Article I, Section 3 provided that each state be entitled to two senators. It is therefore clear that as a matter of law, the Senate at the time the Fourteenth Amendment was proposed consisted of 72 seats. The Fourteenth Amendment, as is recorded by **Congressional Globe**, 39th Congress, First Session 4032, was proposed by only thirty-three members of the Senate. Article V requires that ⅔ of both houses must propose amendments. It is clear that the proposal was made by a number less than the 48 which would have been required if the ⅔ provisions of Article V were honored. The amendment, having been unconstitutionally proposed, can not be constitutionally adopted.

The state will readily acknowledge that the position herein taken has previously been rejected by the United States Supreme Court. However, such factor was facing those who undertook the appeals in the cases of **Gideon vs. Wainwright,** 372 U.S. 335, 9 L.Ed. 2d 799, 82 S.Ct. 792, and **Brown vs. Topeka Board of Education,** 347 U.S. 483.

The position herein urged by the state, if adopted, will insure continued constitutional stability of the present government. If the position of the appellants is adopted, then we have clear precedent for the proposition that 51% of the membrs of each of the federal legislative bodies can, by resolution or bill, expel the other 49%, and then propose by ⅔ vote of the remaining members a constitutional amendment transferring federal judicial power from the United States Supreme Court to the various and sundry state courts. It is quite probable that the self-interest of the states would

be of such a magnitude as to insure a quick ratification of such amendment, once proposed. It is submitted that a proposition supporting such occurrence clearly is unsound. The rejection of such proposition requires a rejection of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, because of the foregoing reasons, it is respectfully urged that the appellants have not sustained their burden of demonstrating clear constitutional grounds for reversal.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Appellee has been furnished by mail this ..... day of September, 1964, to the following as members of counsel for Appellants:

Honorable Jack Greenberg; Honorable James M. Nabrit, III; Honorable Leroy D. Clark; Honorable Robert Ramer; Honorable H. L. Braynon; Honorable G. E. Graves, Jr.; Honorable Louis H. Pollak, and Honorable William T. Coleman, Jr.

Of Counsel for Appellee